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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 426

EUGENE DENNIS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 408-416) has not yet been reported. The memorandum opinion of the district court denying petitioner's motion to dismiss the indictment appears at pp. 19-27 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered October 12, 1948 (R. 417). On October 30, the Chief Justice extended the time to file a peti-

tion for a writ of certiorari to November 29, 1948 (R. 419), and the petition was filed on November 27, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, who deliberately failed to appear before the House Un-American Activities Committee pursuant to subpoena, has standing to challenge the constitutionality of the Committee's authority; and if so, whether the House Resolution which authorized the Committee is constitutional.

2. Whether petitioner has standing to challenge the right of a member of the Committee to be a member of the House of Representatives.

3. Whether a wilful default within the meaning of R.S. 102 requires an evil purpose in addition to deliberate and intentional conduct.

4. Whether a letter which petitioner sent to the Committee in lieu of appearance, in which he asserted that the Committee had no constitutional validity, was properly excluded as being irrelevant to the issue of petitioner's deliberate default.

5. Whether petitioner could properly be served with a subpoena by the Committee at the time he was voluntarily appearing before the Committee.

6. Whether government employees could properly serve on the jury which tried petitioner.

STATUTES AND RESOLUTION INVOLVED

R.S. 102, as amended (2 U.S.C. 192), provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

House of Representatives Rule XI(q)(2), as amended by Section 121(b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, 828, and thereafter adopted by the House of Representatives (H. Res. No. 5, 80th Cong., 1st sess.), provides:

> The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United

States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

On April 30, 1947, an indictment was filed against petitioner charging a violation of R.S. 102 in that, having been duly summoned to appear

and give testimony before the Committee on Un-American Activities of the House of Representatives, he failed to appear and therefore willfully made default (R. 3-4).

The evidence may be summarized as follows:

During March 1947, the Committee on Un-American Activities had under consideration two bills relating to the Communist Party (R. 174). On March 18, 1947, petitioner, the general secretary of the Communist Party, requested an opportunity to appear on behalf of the National Committee of the Party. That request was granted. Petitioner was later informed that, as he had requested, he had been allotted two hours to testify before the Committee. (R. 165-166.)

On March 26, 1947, petitioner voluntarily appeared before the Committee. He gave his name as Eugene Dennis and was then asked whether that was his true name, whether he had any other name, and whether he had used any other name on a passport. Petitioner stated that he was there under the name of Eugene Dennis and would testify only under the name of Eugene Dennis. He refused to answer any questions about his name and refused to state where or when he was born. (R. 168, 219-220.) After about five minutes of this "wrangling over the question of names," the Chairman of the Committee directed that a subpoena be served on petitioner (R. 168, 219-220).

The chief investigator for the Committee thereupon approached petitioner to serve him with a subpoena. Petitioner stood up and said, "In the name of the American people, I hold this committee in contempt" (R. 221). The investigator went up to petitioner and endeavored to hand him a subpoena calling for his appearance on April 9, and stated, "Mr. Dennis, I have a subpoena here for you to appear on April 9" (R. 221). Petitioner folded his arms. The investigator laid the subpoena on petitioner's arm and petitioner turned and walked away (R. 221). Petitioner "tossed [the subpoena] on the table" from which it was later taken by a newspaper man who was present at the time (R. 241-243).

On April 7, the Committee sent petitioner a telegram reminding him that he was under a duty to appear in response to the subpoena served on March 26 (R. 173-174).

On the morning of April 9, petitioner's name was called before the Committee. He did not respond. (R. 250.) Mr. Lapidus, who described himself as Secretary of the Communist Party and attorney for petitioner, stood up and said he wanted to read a statement by petitioner[1] (R. 251-252). He was told to leave the statement with the Committee (R. 252). The presiding member of the Committee (see R. 249) stated that the Com-

[1] The statement was in the form of a letter from petitioner to the Committee (see R. 396-407).

mittee should consider the statement in executive session and determine whether it gave valid reasons for not answering the subpoena (R. 252).

The Committee reported to the House of Representatives that petitioner had been duly served with a subpoena, that a telegram had been sent to him reminding him of his duty to appear, that he had failed to appear, and that his wilful and deliberate refusal was a violation of a subpoena in contempt of the House of Representatives (R. 159-162). The House certified the report of the Committee to the United States Attorney for the District of Columbia for action (R. 158-159), and petitioner was thereafter indicted (R. 3-4).

Petitioner moved to dismiss the indictment on the grounds that the resolution prescribing the authority of the Committee was unconstitutional, and that one of the members of the Committee, John E. Rankin, was not properly a member of the House of Representatives (R. 5-7). He made a motion for the taking of testimony in support of his allegations with respect to the unconstitutionality of the Committee (R. 15-19). Petitioner also moved for an examination of the grand jury minutes on the ground that his letter to the Committee expressing the reasons for his refusal to appear on April 9 had not been presented to that body (R. 7-14). Petitioner's motions were denied, the district court holding that the Committee was properly constituted, that the indictment charged an

offense, and that, as a matter of law, petitioner's letter was not a bar to prosecution for his failure to attend (R. 19-27).

During the trial, references by petitioner's counsel to petitioner's letter, asserting his reasons for failure to appear before the Committee and attempts to prove the assertions made in that letter as to the alleged unconstitutionality of the Committee, were excluded on the theory that since wilful default, as used in R.S. 102, meant merely deliberate and intentional default, petitioner's alleged good faith reliance on the advice of counsel as to the unconstitutionality of the Committee was irrelevant (R. 110-124, 130-144, 189-198, 213-216, 270-272, 277-283).

Petitioner was convicted (R. 342). Before imposing sentence, the trial judge gave him an opportunity to purge himself of contempt by testifying before the Committee, but petitioner indicated that he did not desire to do so (R. 360-361). He was sentenced to imprisonment for one year and fined $1,000 (R. 362). On appeal, the judgment was affirmed (R. 417).

ARGUMENT

1. Petitioner's attack on the constitutional validity of the Committee on Un-American activities (Pet. 13, 16-19, 30-36) raises issues which were rejected by the Court of Appeals for the Second Circuit in *Josephson* v. *United States*, 165 F. 2d

82, certiorari denied, 333 U. S. 838, and by the Court of Appeals for the District of Columbia Circuit in *Barsky* v. *United States*, 167 F. 2d 241, certiorari denied, 334 U. S. 843, petition for rehearing pending.[2] On that question, we rest on those opinions and our brief in opposition in the *Josephson* case, No. 535, O. T. 1947. As in the *Josephson* case, we also question the standing of petitioner, who refused to appear before the Committee at all, to challenge the authority of the Committee to propound questions to him.

2. Petitioner also attacks the legality of the Committee on the ground that Congressman Rankin should not properly be a member of the House of Representatives (Pet. 15-16, 23-25, 29, 43-51). He argues that Congress should have exercised the power conferred upon it by the Fourteenth Amendment to reduce the basis of the representation of those States abridging the right to vote and that, had it done so, the state of Mississippi would have been entitled to four Representatives, rather than seven; and that, since Congress improperly allowed seven Representatives to Mississippi, no Representative from that state is properly a member of the House.

Manifestly, petitioner has no standing to raise that issue. Under Article I, Section 5 of the Con-

[2] See also *Eisler* v. *United States*, No. 255, O.T. 1948, certiorari granted, November 8.

stitution, each House is the "Judge of the Elections, Returns and Qualifications of its own Members." Issues as to the apportionment of Representatives are political ones beyond the power of a court to review. *Colegrove* v. *Greene*, 328 U. S. 549; *Saunders* v. *Wilkins*, 152 F. 2d 235 (C. C. A. 4), certiorari denied, 328 U. S. 870. Certainly, petitioner, who was merely summoned before a Committee of the House, cannot thus collaterally challenge the decision of Congress as to its own membership.

3. Petitioner contends (Pet. 14, 22-23, 36-38) that the term "wilfully," as used in R.S. 102, should be construed to mean with an evil purpose and not, as the district court construed it, to mean deliberate and intentional default as distinguished from accident or inadvertence (see R. 143). That issue was fully discussed and was determined against petitioner's position in *Fields* v. *United States*, 164 F. 2d 97, 100 (App. D. C.), certiorari denied, 332 U. S. 851. As the district court said in ruling on the question in connection with the motion to exclude references to petitioner's letter to the Committee allegedly expressing his reasons for failing to appear (R. 143-144):

> * * * A broader construction which would include the word to mean in bad faith or with a bad purpose, as contended by the defendant's counsel, would in practice nullify the sanctions for compulsory attendance of witnesses

before congressional committees. Under such a construction an unwilling witness would need only to say, when he is put to trial, that upon advice of counsel he believed the committee to be illegally constituted or that the inquiry was beyond the scope of the creating resolution. Upon such a showing and upon an instruction to the jury that good faith or absence of bad purpose constituted a defense, a defendant would inevitably escape punishment, and a committee could never obtain the testimony of an unwilling witness.

4. Petitioner's contention that the trial court erred in excluding from evidence his letter to the Committee allegedly explaining the reasons for his non-apparance (Pet. 14, 22-23, 27, 40) depends on the validity of the contentions discussed above, and falls with the failure of those premises. The letter, which is set forth in full in the record as defendant's proposed Exhibit 5 (R. 396-407), was not really an excuse for non-attendance; it was in reality a challenge to the legality of the Committee. As we have shown, the legal contentions there made are improper, and petitioner had no standing to make them. If the trial court had permitted the letter to go before the jury it would, under its construction of the term "wilful"—a construction which, as we have shown, is clearly correct—have been bound to instruct the jury that the letter could not be considered as bearing on the issue of wilfulness. Since the letter was clearly irrelevant to the one issue as to which petitioner wished to

have it introduced, no purpose would have been served by admitting it in evidence.

Furthermore, to have allowed the letter in evidence would have brought before the jury the legal issues with respect to the legality of the Committee which, as we have shown, petitioner could not properly raise as a defense to the prosecution. In fact, at the trial petitioner's counsel specifically asserted that he had a right to prove, not only that petitioner had made such contentions as the reason for his non-appearance, but that his contentions in this respect were correct (R. 136; see also petitioner's offer of proof, R. 383-395). Manifestly, petitioner could not thus put before the jury indirectly that which he was properly excluded from attempting to prove directly. The letter would have brought into the trial wholly irrelevant issues which had no bearing on the issue before the jury, i.e., whether petitioner deliberately and intentionally failed to appear before the Committee pursuant to the subpoena. The trial judge therefore properly excluded the letter and all references thereto.[3]

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[3] For the same reasons, the letter had no bearing on the issues before the grand jury and need not have been produced before that body, or before the House of Representatives. Far from showing lack of wilfulness, the letter merely confirms the fact that petitioner's failure to appear was deliberate and intentional. At the time of the Committee's report to the House, the House was informed that petitioner had sent an attorney on the day he was summoned to appear (R. 255).

5. Relying on *Wilder* v. *Welsh*, 1 MacArthur 596 (Sup. Ct. D. C.), petitioner contends (Pet. 19-20, 38-39) that, as a witness before a Committee of the House of Representatives on March 26, 1947, he was immune from service of the subpoena. Petitioner, however, failed to raise that issue on the return date of the subpoena and therefore waived it, if it was available to him. *In re Hall*, 296 Fed. 780 (S. D. N. Y.), petition dismissed, 2 F. 2d 1016 (C. C. A. 2).

In any event, the case upon which petitioner relies held merely that a witness before a congressional committee has no greater privilege than a member of Congress. Under Article I, Section 5 of the Constitution, each house of Congress may compel the attendance of its own members. Furthermore, the exemption of a witness or party from service of process does not extend to service of a subpoena to testify in the same matter as to which he is already in attendance. *Norris* v. *Hassler*, 23 Fed. 581 (C. C. D. N. J.). Petitioner was subpoenaed to testify before the same Committee to which he had voluntarily presented himself to give testimony. The reasoning of the *Norris* case applies to the service of a subpoena on him at that time.

6. Petitioner contends (Pet. 14, 21-22, 27, 40-43) that it was error to deny his challenge to the jurors who were government employees on the ground

that the loyalty order with respect to government employees (Executive Order 9835) would prevent them from fairly judging the case, in that a verdict in petitioner's favor might be construed as sympathetic association with Communists (R. 64-65).[4] The prospective jurors were, however, extensively questioned on the voir dire for any signs of prejudice (R. 46-106). Jurors who had read about the case and formed opinions were excused for cause (R. 72-75, 87), as was a juror who belonged to an anti-communist organization (R. 66). Of the jury as finally drawn (see R. 105), only three had read of the case in the newspapers, and two of these stated that such reading merely consisted of "scanning the headlines." All three stated that such information as they had about the case would not influence their judgment. (R. 66, 69, 88.)

Seven of the jurors selected were government employees: three worked for the Post Office Department (R. 55, 76, 83), one was a card punch operator in the Bureau of Supplies of the Navy Department (R. 56), one was employed at the Naval Gun Factory (R. 89), one was employed as

[4] Petitioner made a motion under Rule 21(a) of the Federal Rules of Criminal Procedure for a change of venue from the District of Columbia on the same ground (R. 27-32). The motion was denied, the court stating that it was not satisfied that there exists in the District of Columbia "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" (R. 41).

a clerk in the Department of Commerce (R. 67), and one was employed as a press helper at the Government Printing Office (R. 93). Each of the government employees was specifically asked if he felt that a not guilty verdict would subject him to investigation of his loyalty and each replied that he was certain that it would not (R. 55, 56, 68, 76-77, 84-85, 89-90, 93).

This Court has recently held that the mere fact of government employment does not disqualify a juror from sitting in a criminal prosecution; it held that government employees, like others, are subject to disqualification only for "actual bias." *Frazier* v. *United States*, No. 44, this Term, decided December 20, 1948. Here, actual bias by the government employee jurors was not shown; on the contrary, the jurors were carefully questioned to determine that there was no bias. Under the circumstances government employment *per se* was properly rejected as a basis for disqualification of the jurors.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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